



Commonwealth  
of Massachusetts

## *OCPF Online*

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*Office of Campaign and Political Finance*

*One Ashburton Place, Room 411*

*Boston, MA 02108*

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### Advisory Opinion

September 25, 2006

AO-06-07

Andrew Upton, Esquire  
Holland & Knight LLP  
10 St. James Avenue  
Boston, MA 02116

Re: Independent Expenditures and Coordination with State Candidate Campaigns

Dear Mr. Upton:

This letter is in response to your August 28, 2006, letter that requested an advisory opinion.

You have stated that you represent 1199 Service Employees International Union/United Health Care Workers East ("SEIU"). SEIU intends to make various independent expenditures in state level races and also intends to make in-kind contributions, i.e., "coordinated expenditures", consisting of the use of telephone lines, on behalf of certain candidates. SEIU may also contribute the services of SEIU personnel to certain state candidates for whom SEIU has made independent expenditures.

QUESTION: May SEIU make independent expenditures in support of certain candidates while at the same time making in-kind contributions in support of the same candidates, by insulating SEIU officials and members involved in making the independent expenditures from those involved in making the in-kind contributions?

ANSWER: Yes, but SEIU must establish a "firewall" sufficient to avoid the sharing of information about candidates' plans, projects, and activities or needs by those involved in making coordinated expenditures with those involved in making independent expenditures. Although establishing a firewall may be a difficult task, as outlined below, it is not insurmountable.

DISCUSSION: Independent expenditures are defined, in part, as expenditures not made in consultation or cooperation with a candidate or the candidate's committee. See M.G.L. c. 55, § 18A. Section 18A requires disclosure of independent expenditures supporting or opposing a candidate that exceed \$100 during a calendar year. Independent expenditures, unlike contributions, may be made without limit. See *Buckley v. Valeo*, 424 U.S. 1 (1976). Your question requires consideration of whether an organization that provides in-kind contributions in support of a candidate may concurrently make independent expenditures supporting the same candidate.

An organization's payment for a coordinated communication is an in-kind contribution to the candidate's committee with which it coordinated the expenditure and must be reported as an in-kind contribution by the benefited committee. It would be limited as such by the Massachusetts campaign finance law. See IB-06-01.

OCPF has not previously considered whether a "firewall" would allow an organization to make independent expenditures while at the same time making coordinated in-kind contributions. In AO-01-22, however, the office said that if an employee of an organization who provides services to a candidate or committee on his own time also participates in the organization's identification, authorization, or any other aspect of the organization's decision-making process concerning which candidates or committees the organization should support, such involvement by the employee may cause expenditures by the organization to be considered "contributions" rather than independent expenditures. See also AO-00-17 (stating that a candidate's wife's union may make independent expenditures to support the candidate so long as there is no coordination of such expenditures).

The determination of whether a communication is coordinated and should be treated as an in-kind contribution requires consideration of a number of factors, mostly relating to whether there are facts indicating that the organization and a candidate are working together. See IB-06-01, page 8. For example, a communication requested or suggested by a candidate or the candidate's committee would be considered an in-kind contribution from the organization making the expenditure. As stated in IB-06-01, establishing sufficient coordination of an expenditure to trigger regulation as an in-kind contribution requires demonstration of "some to and fro" between an organization or individual making an expenditure and a campaign. FEC v. Christian Coalition, 52 F. Supp. 2d 45, 93 (D.D.C., 1999). For example, coordination of expenditures for "get-out-the-vote telephone exhortations must rise to the level of discussion or negotiation over (1) the contents of the script; (2) when the calls are to be made; (3) the 'location' or audience, including discussion of which databases are to be used; or (4) the number of people to be called." Id. The timing and content of a communication may also be relevant in determining whether there was coordination. See IB-06-01. A similar analysis would be applied to other types of coordinated communications.

Where an organization plans to make both coordinated and independent expenditures on behalf of a candidate, the organization must ensure that the independent expenditures are truly independent of the candidate, his or her committee and agents of the candidate and committee. (See Section 18A). This may be a difficult task, but it is not insurmountable. To make both coordinated and independent expenditures, while making sure that the independent expenditures are not subject to regulation as an in-kind contribution, will require the creation of a "firewall" to prohibit the flow of information from the entity making coordinated expenditures to the entity making independent expenditures. Massachusetts does not have regulations relative to the erection of such a firewall, but the Federal Election Commission has added such a provision in new 11 CFR 109.21(h), which we believe provides a useful framework that can be adopted in the context of the Massachusetts campaign finance law.

The regulation, 11 CFR 109.21(h)(1), provides a "safe harbor" allowing an organization to be involved in both types of activity under the following circumstances:

- (1) The firewall must be designed and implemented to prohibit the flow of information about the candidate's . . . campaign plans, projects, activities, or needs between those employees or consultants providing services for the person paying for the communication [i.e., the independent expenditure] and those employees or consultants who currently provide, or previously provided, services for the

candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee; and

- (2) The firewall must be described in a written policy that is distributed to all relevant employees, consultants and clients affected by the policy.

According to the FEC, in its Explanation and Justification for the new regulations, "... committees have used different approaches in the past to avoid the possibility of coordination when some employees of a committee work on independent expenditures at the same time that other employees of the committee work with candidates. ..." See Federal Register, Volume 71, Number 110, 33206. In some instances, "... specific employees are placed on separate teams within the organization so that information does not pass between the employees who work with candidates and their agents." Id.

The Explanation and Justification also states that "... [e]stablishing firewalls and similar screening policies is an effective way to simultaneously protect the right of organizations to make unlimited independent expenditures and to protect that right and avoid improper coordination." Id. The FEC concluded that it is possible for an organization to create an effective firewall between different employees or between different units within its organization to prevent staff from conveying information from one client to another. "Similarly, a political committee with an effective firewall can prevent involvement by, and discussions between, a candidate or political party committee and the individuals creating the communication." Id.

A firewall is more effective if established and implemented by each organization in light of its specific circumstances. According to the Commission, a firewall must be described in a written policy that is distributed to all relevant employees, consultants and clients affected by the policy. See new 11 CFR 109.21(h)(2). The FEC defines "relevant employees" to include

all employees or consultants actually providing services to the person paying for the communication or the candidate or political party committee. To ensure that the firewall is in place before any information is shared between the relevant employees, the written firewall policy should be distributed to all relevant employees before those employees begin work on the communication referencing the candidate or political party. ... [M]ere contact between or communications between persons on either side of the firewall does not compromise the firewall as long as the firewall prevents information about the candidate's or political party committee's campaign plans, projects, activities or needs from passing between persons on either side of the firewall. Federal Register, Volume 71, Number 110, 33206 - 7.

The safe harbor does not apply if there is specific information indicating that, despite the firewall, either (1) information about the candidate's or his or her committee's campaign plans, projects, activities or needs that is material to the creation, production, or distribution of the communication was used by the commercial vendor, former employee, or political committee; or (2) the common vendor, former employee, or political committee conveyed this information to the person paying for the communication. See new 11 CFR 109.21(h). In such circumstances, the expenditures are considered coordinated.

We find the FEC's analysis and regulations consistent with OCPF's previous opinions and would tend to adhere to this approach when considering whether a particular expenditure is

coordinated or truly independent. Therefore, if SEIU establishes written procedures or measures that effectively prevent the flow of information from those involved in coordinating expenditures supporting or opposing a candidate, SEIU should also be able to make independent expenditures relating to the same candidate. SEIU should take extra precautions to insure that independent expenditures are not in fact contributions, as OCPF would closely scrutinize the expenditures to ensure that disclosed independent expenditures are not in fact coordinated.

We appreciate your interest in the campaign finance law. This opinion is based on the representations in your correspondence, in your conversations with OCPF staff, and is issued solely within the context of the Massachusetts campaign finance law.

Please do not hesitate to contact this office should you have additional questions about this or any other campaign finance matter.

Sincerely,

A handwritten signature in black ink that reads "Michael J. Sullivan". The signature is written in a cursive, flowing style.

Michael J. Sullivan  
Director

MJS/sh